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Supreme Court of the United States

October Term 1950

No. 539

CLARENCE O. CRAVEN,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I

OPINIONS OF THE COURT BELOW

The opinions of the court below are to be found at the places indicated in the brief of petitioner.

II

JURISDICTION

The jurisdiction of this court is not controverted. It is, however, submitted that none of the reasons enumerated in Rule 38-5 of the Revised Rules of this court as sufficient to warrant consideration on review on writ of certiorari, is applicable to the matters presented by the petition.

III

QUESTIONS PRESENTED

The questions presented by the petition are subject to more succinct and, we believe, more accurate statement than that contained in the petition. No matter how dressed in verbiage they may be, they are factual. They are two in number: (1) Is there evidence in this record of negligence on the part of the defendant? and (2) If so, is there evidence in this record that such negligence was a cause, either sole or contributing, of the injuries suffered by the plaintiff?

IV

THE QUESTIONS BEFORE AND THE DECISIONS OF THE LOWER COURTS

In addition to the two questions presented to this court there were also before the District Court the following questions: (1) Was the plaintiff at the time he was injured engaged in interstate commerce or in any work in furtherance thereof or directly, closely, or substantially affecting such commerce? (2) Did the evidence so clearly prove the negligence of the plaintiff as to require that the jury be charged that he was guilty of negligence, or was that a question for the jury? and (3) There were certain questions relating to the charge not necessary here to mention, save one:—the plaintiff had requested the court to charge that the jury might conclude that defendant had been guilty of negligence with respect to the conditions of the end of the gondola car on which he stepped (Reporter's transcript pp. 282-3, 286; R. p. 41). This the District Court had advised counsel it would not charge, because there was no evidence of any defect. Despite this advice from the court, plaintiff's counsel argued a possible defect at some length. Neverthe-

less the court failed to charge that the duty of keeping cars in proper condition was not involved in this case. (Reporter's transcript pp. 282-3, 286; R. p. 41).

The District Court held the plaintiff was engaged in interstate commerce at the time he was injured. It held that there was evidence of negligence on the part of defendant sufficient to take that question to the jury. It never decided whether or not there was evidence of causal connection sufficient to take that question to the jury; it held there need be no evidence from which an inference of causal connection might be drawn,—that there need be no proof of causal connection because "if any negligence is shown the jury are the sole judges of whether it is reasonably possible to infer a causal relationship between the act of negligence and the injury" (R. p. 45). The District Court left to the jury the question whether the plaintiff was guilty of negligence (R. p. 37, 39), but in its opinion it held that plaintiff was guilty, as a matter of law, of contributory negligence, for it said:

> "There can be no doubt concerning the contributory negligence of the plaintiff * * * ." (R. p. 44)

But, despite these errors in the instruction, it declined to grant a new trial.

In other respects the District Court found no error in the instruction.

The Court of Appeals had before it all the questions presented to the District Court. It held that plaintiff was engaged in interstate commerce at the time he was injured. It held that there could be recovery "only upon the concurrence of negligence and injury as cause and effect" and that there was no evidence from which "a jury could have found either". (R. p. 135).

This, of course, disposed of the case.

But, in addition the Court of Appeals held that the plaintiff was guilty of negligence as a matter of law, that his "recklessness and not the assumed negligence of defendant, exposed plaintiff to unnecessary danger and caused his injury". (R. p. 138).

The Circuit Court also very clearly in the first paragraph beginning on page 139 of the Record held that the action of plaintiff's counsel in arguing to the jury a possible defect in the gondola car, and the failure of the court to cover that matter in its charge, had permitted the jury to speculate upon a possible defect, and there was no evidence of any defect, and that this was error.

It seems to be implicit in the opinion of the Court of Appeals that the action of the District Court in leaving to the jury the question of the negligence of the plaintiff, when that negligence was proved as a matter of law, and the action of the District Court in permitting the jury to speculate upon a possible defect in the gondola car when there was no evidence of any defect, would have required a reversal of the judgment of the District Court and a remanding of the case for a new trial, had not the lack of any evidence of negligence on behalf of defendant and the lack of any evidence of causal connection demanded that the case be reversed and remanded to the District Court with instructions to enter judgment for the defendant.

V

SUMMARY OF ARGUMENT

It is our contention that no reasonable view of this evidence establishes any negligence on the part of the defendant, and that if any of the three actions of defendant which petitioner assumes to have been negligent, were negligent,

there was no legal causal connection between that action and the injuries sustained by the plaintiff. The plaintiff was injured solely as a result of his own recklesness and by reason of his own inexcusable impatience, best stated in his own words:

> "I didn't see no reason why I should stand there and wait for that train to make the operation that it was going to make." (R. p. 24);

And again:

> "I had been on duty and was tired and I didn't want to keep standing there and losing my rest period." (R. p. 25)

He accordingly did a thing which every sentient human being knows to be dangerous. He did it of his own volition; he was under no compulsion to do it. He did it because of impatience; he did it intentionally, fully aware of all the circumstances and potential dangers. For injuries so sustained the defendant is not liable.

VI

ARGUMENT

1. Certain Corrections.

The factual statements, as well as certain statements concerning the procedure, contained in petitioner's brief are so clearly erroneous that certain corrections will be made at this point and others in the brief statement of fact which follows.

We do not understand either the pertinence of a statement repeatedly made, or how it is possible for any person familiar with this proceeding repeatedly to state, as does the peti-

tioner, that no objection or exception was taken to the charge to the jury. Petitioner says:

> "The trial court, * * * , submitted to the jury the issues of primary negligence, contributory negligence and cause and effect in simple and fair language to which there was no objection or exception." (Petitioner's brief, p. 7).
>
> "The charge contains a correct statement of the legal principles applicable, and no exception being taken thereto, * * *." (Petitioner's brief, p. 13)
>
> "The instruction of the court to the jury is binding for purposes of appeal because no exception was taken thereto." (Petitioner's brief, p. 28)
>
> "* * * under a charge to which there was no exception." (Petitioner's brief, p. 29)

The objections to the charge stated in the Record at the conclusion of the charge are found on pages 285-8 of the reporter's transcript. They are nine in number. Defendant had moved for a directed verdict, in part upon the ground that there was no evidence of negligence and that there was, of course, no evidence of causal connection. In addition, it specifically objected to the charge because the court had stated that certain duties rested upon the defendant and "there is no evidence in this case from which a violation of any one of those duties might be inferred and if perchance there be such, there is no evidence from which it could be found that any negligent act caused in whole or in part the injury sustained by the plaintiff." Detailed objection was made in many other respects. If further refutation of these unwarranted assertions contained in the petition be needed, we refer to defendant's motion to set aside the verdict and to enter judgment for the defendant and its alternative motion for a new trial found on pages 40-43 of the record.

2. Summary Factual Statement.

The yards of defendant at South Rocky Mount are a very large terminal and consist of three yards. Plaintiff's Exhibit No. 3, the aerial photograph reproduced in his brief, shows only the northern portion of the "north yard." It shows nothing of the yard immediately to the south thereof, i.e., the "local yard," or the yard immediately to the south thereof, i.e., the "south yard."

Plaintiff's Exhibit No. 9 is a lengthy blueprint on a scale of one inch to a hundred feet of the north yard, the local yard, and just the bare beginning of the south yard. (Reporter's transcript p. 75, R. p. 98). With this brief we file with the Clerk a sufficient number of copies of this exhibit (which is too bulky to be bound with the brief) to be distributed to the members of the court, along with the brief. This we do for two reasons. It gives a much more accurate picture of the physical conditions than can be gotten from any other source and, as we hereafter show, it is a complete and final answer to the contention of the plaintiff that had the walkway been moved to the north it would have been a safer walkway.

On this plat and toward the north end, there is shown "Restaurant", the building which all through the evidence is referred to as the "Yard Office" or the "C O Office". Immediately to the south of that office is the telegraph office and behind that is a toilet and washroom.

Immediately behind these buildings are the hostler tracks, and immediately to the south of them are the ladder tracks of the north yard, to which it will be noted access may be, and is had, both from the north and from the south.

On the face of this plat it will be noted that at the south end of the local yard there is another yard office, which would seem to be a refutation of the statement that all business in

the whole terminal is conducted from the yard office in the north yard. Whether there is an office in the south yard is not disclosed by this evidence, but this evidence discloses that as much business is conducted in the south yard as in the north yard (R. p. 99).

We do not controvert the statement made by the Court of Appeals that this group of buildings is the focal point of the yards, (R. p. 133), nor do we deny that in March, 1943, when the War was at its height, and when this defendant, like all the other railroads of the country, was pressed with traffic to the limit of its capacity, and when it was not only enjoying, but suffering, a business that taxed its every resource, the north yard of this terminal was very busy, and many persons unquestionably passed back and forth across the five tracks which separated this Yard Office in the north yard from the street of the town of South Rocky Mount. But we do most vigorously controvert the implication that work throughout this terminal primarily was engaged in at this particular point; that in classifying approximately 1,500 cars a day in the north yard, each of them necessarily passed in front of this Yard Office; that each of the 135 trains which came into and left the terminal during the course of 24 hours was focused on this point. No witness so stated and no such implication can be drawn from the evidence as a whole. If each of the 135 trains which came in and departed from the terminal in a 24 hour period ran the whole length of it, each of those trains obstructed this walkway no more than it would have obstructed a walkway leading from the street of Rocky Mount across the main line at any point in the yard, whether a quarter of a mile to the north or two miles to the south. No witness testified that all classification in the north yard took place by working the ladder tracks from the north end. The evidence simply shows

that approximately 1,500 cars were classified a day in the north yard and the plat shows that the ladder tracks are so built that it may be worked from either end.

The fact of the matter is that approximately 135 trains a day were coming into and leaving these yards and approximately 4,000 cars a day were being classified therein, and those facts in themselves conclusively prove that these tracks, running adjacent to the street of the town and being the through tracks running through the whole terminal, were busy during the whole day.

When the plaintiff had left his engine in the hostlers yard, he says (Petitioner's brief p. 9) that he had three additional duties which are stated so as to indicate that they were required to be immediately performed. His own testimony either controverts the existence of the duty or the implication that it was to be performed immediately.

It is first said that he was required to report to his conductor the time that he left his engine, and elsewhere (p. 36) an instruction given to conductors to report "as quickly as possible after completion of a trip" the time of each member of the crew, is referred to, apparently as indicating that it was the duty of the plaintiff immediately to find his conductor and report. Perhaps that inference might be drawn from this instruction given to conductors (and the plaintiff was not a conductor), but for the fact that the plaintiff himself positively testifies that under the practice which was followed and which was well known to him, there was no duty immediately to report.

On the date in question the plaintiff had worked with Conductor Sargent with whom he had previously worked many times (R. p. 21). The plaintiff himself testifies that sometimes after leaving the engine on the hostler track he would see Mr. Sargent at the Yard Office and make the time

SPOTS ON PAGE

report to him there; sometimes he would see him on the west side of South Main Street and then make report; sometimes he would see him later on in Rocky Mount and make report; and sometimes he would make the report to Mr. Sargent when he reported some hours later for his trip back north; and further that this was in no wise different from the places and times when he would report to other conductors under whom he might be working (R. pp. 26, 27). The plaintiff's testimony is completely corroborated by Mr. Sargent, who says that about half the time he received the plaintiff's report in the Yard Office or on the street opposite the Yard Office shortly after plaintiff had ceased work, and about half the time he received it later in the day if they happened to meet in Rocky Mount or when they reported back for duty in connection with their northern run (R. p. 19).

In the petition the plaintiff states that on knocking off work he was required to see that his name and address was properly entered on the register kept for that purpose. His testimony does not sustain him. He testified that sometimes he would look at the register to see whether his conductor had entered him thereon, and sometimes when he reported some hours later for his return trip, he would look at the register (R. p. 72). This is in perfect keeping with the testimony of the yardmaster who said there was no duty on the brakeman to make any entry on the register, but that he did have the right so to do if he so desired (R. p. 87); and again that a brakeman is not required to sign the register when he completes his run, but that it is a duty of the conductor to register the whole crew (R. p. 88).

Plaintiff says that it was contemplated he would wash up and change his clothes before going on the public streets or to his rooming place, and that this was customarily done

by the plaintiff and other trainmen in the washroom near the Yard Office in the north yard. The best answer to this statement is found on page 68 of the record, the very page to which plaintiff refers in his petition.

"Q Does the railroad company provide a wash room and facilities there next to this C O office for this brakeman to wash up in?

A They do.

Q Isn't it customary and part of his normal course to go there and wash up after he finishes one of these runs?

A It depends. Some of them do and some of them don't. Some of them go down to the YMCA and wash up.

Q Certainly they have the privilege of going there and using those facilities.

A Yes."

And if other answer be needed, we take the plaintiff's own testimony that on the day in question, having left his engine, he was free to wash at the company's wash room, or at the YMCA, or at his room in Rocky Mount, or to do anything else he wished to do. (R. p. 27).

On the day in question the plaintiff came by the Yard Office and did not see his conductor. He went across the street and did not see his conductor. Then, and still being free to do anything he wished to do, he decided to re-cross the tracks to wash up. Here again we get a startling factual mis-statement in the petition and one for which there is no justification whatsoever. It is said "his purpose in returning was to wash up and change his dirty clothing, to check the register and to report to his conductor should he meet him on the return trip, in the C O office, or the wash room."

Only the plaintiff knows his purpose and he makes it perfectly clear that his purpose was solely to wash up, and that the alleged purpose to check the register and to continue to look for the conductor is simply the imagination of his counsel.

On direct examination he stated as the sole purpose of his return "to wash my face and hands and pull off those outer garments which were very dirty"; and again "I did not see my conductor on this particular day to give him my time, so I turned around and started back to the C O office which is right here, and this wash room." (R. p. 73). On cross examination (R. p. 27) he makes it perfectly clear that his sole purpose was to go to the wash room, and in response to a request for admission he stated that having failed to find Mr. Sargent on the street he went directly toward a wash room for the purpose of cleaning up (R. p. 15). He gave no other testimony on this subject, unless perchance his testimony found at the bottom of pages 71 and 72 of the record in which he is speaking not of his purpose on this particular day, but of his general custom, be evidence of his purpose on this particular day, and if it be such evidence, it simply substantiates that his purpose was to wash up.

On his return he found, as was not at all unusual, his way blocked by a cut of cars moving north on the track immediately adjacent to the Yard Office. He was aware that the very first statement in the rule book is "Safety is of first importance in the discharge of duty." And he had many times according to his own testimony been instructed that safety was the first and primary rule to be observed (Reporter's Transcript, p. 122). He must have been aware, having exhibited the knowledge of the rules that he did exhibit, and if he was not aware he was charged with knowledge of another rule, namely: "The company does not wish

nor expect its employees to incur any risk whatever from which, by the exercise of their own judgment and personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of their superior or otherwise." (Reporter's Transcript, p. 266).

"Occasionally" (R. pp. 53, 55, 59, 63, 103) a man who finds his way blocked by a moving cut of cars will try to climb through or over them despite the clear danger of doing so. When the yardmaster has seen a man do such a thing he has immediately cautioned him against it (R. p. 31). On this particular occasion the plaintiff was not the only man whose way was blocked. Other men were also standing there. They waited, but the plaintiff in his impatience tried to cross over or through the cars. Reckless as this action would have been under any circumstances, it was doubly reckless on this particular occasion because of a fact which is nowhere mentioned in the petition. The plaintiff's hands were not free. He himself says that he was carrying a paper lunch bag and his lantern (R. p. 25). Thus encumbered, he swung up on the side of the gondola car, eased himself around the corner of it so as to get his foot on a little step that ran across the end, and while attempting to step across to an adjoining flat car (a car which, of course, had on it nothing to which the plaintiff could hold), he fell. He says that something held his leg fast (R. p. 74). He was asked what caught his leg and he did not know. He was asked what there was to catch it, and he replied he saw nothing unusual on the car, only the mechanism of the hinges and the brake (R. p. 28).

An eyewitness, however, who was standing beside him, and who was waiting for the way to become clear, says that as it appeared to him, plaintiff's heel had caught in his own overall or pants leg (R. p. 109). The plaintiff says that the

gondola car on which he climbed was, he thinks, a Pennsylvania car. It was, however, unquestionably a NYC car because within a very short period the whole cut of cars was checked and in the whole cut there was only one gondola car adjacent to a flat car (Reporter's transcript p. 85). The number of those two cars was taken and turned over to the chief car inspector (Reporter's transcript p. 170). The gondola car was a NYC car and the flat car was a Pennsylvania car (Reporter's transcript p. 229). The inspectors could find no defects.

3. The Issue of Negligence.

The District Court found that there was sufficient evidence to take the issue of negligence to the jury because a man would occasionally do the reckless thing that plaintiff did, and in the opinion of the District Court the jury might have believed that a failure to put an absolute stop to this kind of thing constituted negligence. This is not incorporated within any one of the three general classifications in which the plaintiff in his brief says is to be found the negligence charged. It is stated (brief p. 12) that the defendant was negligent with respect to the walkway, with respect to the condition of the brake step, and with respect to the conditions under which the plaintiff was to make his time report.

There can be no question that the decision of *Tiller* v. *A.C.L.*, 318 U. S. 54, and the cases which immediately followed, have caused considerable doubt in the minds of a number of judges whether or not it is still necessary in a case arising under the Federal Employers Liability Act that there be proof of defendant's negligence and proof of the causal connection between that negligence and the injury sustained. See *Griswold* v. *Gardner*, 155 F. 2d 333; *Trust Company of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (cert.

den. 334 U.S. 845). Of this fact this court has taken notice in *Wilkerson* v. *McCarthy*, 336 U.S. 53.

Indeed an example of the confusion is to be found in the opinion of the District Court in this case, wherein it is held that there need be no evidence upon which causal connection may be based; but that if there be evidence of negligence only, the case is to go to the jury who then become "the sole judges of whether it is reasonably possible to infer a causal relationship between the act of negligence and the injury".

We think, however, it is now far too late to urge that there is any feature of insurance in the Federal Employers Liability Act. It is a "liability" act, and one cannot recover under it unless there be proof of negligence of the defendant, and unless there be evidence of causal connection between that and the injury. *Tiller* v. *A.C.L., supra, Wilkerson* v. *McCarthy, supra, Brady* v. *So. R. Co.*, 320 U.S. 476. Indeed in *Tennant* v. *Peoria*, 321 U.S. 29, the case cited in the District Court's opinion, it is said:

> "Petitioner was required to present probative facts from which the negligence and causal relation could reasonably be inferred."

Speculation is not an adequate substitute for proof. *Moore* v. *C. & O. R. Co.*, decided by this court on February 26, 1951; *Tennant* v. *Peoria, supra.*

Now the first general classification into which the petitioner says the negligence charged against the defendant falls is with respect to the walkway leading from the street to the Yard Office. He says that the location of this walkway unnecessarily exposed employees to extra hazard; that it should have been moved further to the north (Petition p. 16-17, 25), and that there is no evidence that a change of the

location to the north "would not have eliminated the hazard".

It is first to be remarked that the burden of proof rested upon petitioner. There is here a pertinent failure of evidence. But that failure is not what the petitioner says. It is the failure of petitioner to prove, or to introduce evidence tending to prove, that such a shift of the location of the walkway would have eliminated that hazard. Even, however, if the burden were on defendant to show that a shift of the walkway would not have eliminated the hazard (a burden which does not exist), this evidence so shows.

We refer to plaintiff's own Exhibit No. 9, the large plat of the yards which will be handed to each member of the court with this brief.

It is only natural that people approaching the Yard Office from the west, will come directly across the tracks to it and this will be the case whether or not a paved walkway is or is not laid. Certainly there is no negligence in giving a pedestrian a smooth passageway over tracks at a point which will lead directly to an office. It is perfectly clear that the location of the walkway and the location of the Yard Office are inseparably connected.

The plat is on a scale of one inch to a hundred feet. A mere glance at it and the manner in which tracks run off to the east of it and north of the Yard Office show that it would be possible to move that office only a relatively few feet to the north unless tracks were going to be obstructed. If the building were moved as much as 100′, tracks would be blocked, and unless a large number of other buildings were to be moved and tracks relocated, the Yard Office could not be moved so much as 600′ to the north.

The location of physical facilities within a yard are engineering questions of which this court has said in *Del. R. Co.* v. *Koske*, 279 U.S. 7, 11:

> "Defendant was not bound to maintain its yard in the best and most efficient condition; *it had much freedom in the selection of* methods to drain its yard and in the choice of *facilities and places for the use of its employees.* Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved *in the construction* and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries." (Italics supplied)

Sufficient as is the answer just given, there is an equally complete answer in this particular case. There were seventy cars in the cut of cars being moved. That cut was at least 2,800 feet long. Suppose the walkway had been 200, 300, 500, or 700 feet north of the point where it was located, and suppose the railroad had expected people coming to the Yard Office from the west to cross the tracks, say, north of the Yard Office and then wander down through the yards to the Yard Office. The plaintiff would have still found his way blocked. Every train coming into the yards or leaving the yards would have blocked his way. Many shifting movements would have blocked that way. It is perfectly possible that some movement which would block the walkway as it is located, would not have blocked the walkway if located elsewhere, but in like manner some movement which would have blocked it if located elsewhere, would not have blocked it where it is located. And had the suggestion of the plaintiff been adopted, and had the walkway been located 400 or 500 feet further to the north, then plaintiff would still have found his way blocked by the very movement which did block him. Could it then be said that had he attempted to crawl through the cars at that point, his negligence would have been the sole cause of his injuries, whereas under the exact facts of this case his negligence is not the sole cause of his injuries?

The petitioner states that perhaps a fence should have been constructed along the "right of way where it abuts the street". Suppose the defendant had fenced the whole three miles along the western limits of the yard. Gates would still have had to be installed and persons coming into the yard from the west would still have had to cross these tracks.

Petitioner says that a rule should have been promulgated forbidding employees to cross cuts of cars which blocked their passageway. In answer it is submitted that it is not only impossible, but it would be useless, to attempt to catalog every known foolishly dangerous action that a railroad employee might take, and specifically by rule to instruct him not to take it.

This defendant has stressed safety up to the hilt, and has, as heretofore shown, instructed its employees to incur no risk whatsoever from which by their own judgment and care they can protect themselves, whether or not they be acting under orders of a superior or otherwise. It is not necessary by instructions to give to men information which they already have, and no responsible human being can for one instant doubt that it is always dangerous to mount upon or dismount from a moving object, and particularly so when the hands are encumbered, and even more so when there is nothing to which the person can hold.

Wiggins v. *S.A.L. Ry. Co.*, 154 N. C. 577, 70 S.E. 932 is very much in point. There a brakeman had been employed only one day by the Seaboard Air Line Railway, but he had had some experience on railroads. He attempted to board a moving cut of cars by trying to get on a coal car which had only one step and a straight hand hold at the end of the car. He fell and was injured. He rested his case upon the allegation that he was an inexperienced hand and that he was not instructed as to the manner of getting on a moving

train. The court pointed out that he could have easily and safely boarded the caboose and it said:

> "We fail to see any instructions that would have given him information he did not have."

Another case fairly close to the instant case is *Vilsock* v. *N. Y. & O. Coal Co.*, 256 Pa. 90, 100 Atl. 530. There a brakeman mounted upon the side of a moving motor to ride thereon by standing upon the brake rod, as he said he had seen other people do. He had to go to a siding switch to which he "could easily have walked." The Supreme Court of Pennsylvania reversed judgment in his favor, saying:

> "Plaintiff unnecessarily put himself in a position which he knew to be dangerous. The evidence clearly shows that he brought his misfortune upon himself by his reckless disregard of his own safety in mounting the moving motor at the side, and in attempting to ride thereon while it was operating under conditions with which the record shows he was entirely familiar."

In *Waller* v. *Northern Pac. Terminal Co.* (Ore. 1946), 166 P. 2d 488 (cert. den. 329 U.S. 742), the court relying upon *Brady v. So. R. Co., supra*, very pertinently said:

> "Failure to guard against a bare possibility of accident is not actionable negligence."

Wolfe v. *Henwood*, 162 F. 2d 990 (cert. den. 332 U.S. 733), is likewise somewhat in point. There a laborer had been bailing an accumulation of fuel oil and water from a catch basin. His gloves and clothing became more or less saturated with fuel oil. He then procured waste material and gasoline from a tool house in which no washing facili-

ties were available, though they were available at a station or at a roundhouse some 200 to 500 feet distant. Using this waste soaked with gasoline he sought to remove this oil from his clothing as did the other men. He then "voluntarily and without being ordered to do so but with the idea of protecting the tool house from possible fire" sought to burn the waste by putting it on the ground, removing the glove from his right hand, and striking a match. The glove on the left hand caught fire and from this the rest of his clothing caught.

Negligence was charged for failure to furnish a pump to clean the basin; for failure to furnish protective clothing; and for failure to supply facilities for cleaning up and disposing of waste.

As to the pump, the Court found that it would have been sound practice to remove the fuel oil and water by pump rather than manually, but it held:

> "Defendant had a choice of methods, neither of which was inherently dangerous and cannot be charged with lack of due care in the choice made."

The Court brushed aside the allegation as to the clothing and as to the washing facilities. It said of the allegation of negligence for failure to supply facilities for disposing of waste as follows:

> "In burning the waste Wolfe acted on his own initiative. He adopted this method of disposal at a time when it was an extremely dangerous one because of the condition of his clothing. In the circumstances, defendant cannot be convicted of negligence for alleged failure to furnish a safer method. *It was not the method that was unsafe, rather it was the time and manner of its use.*" (Italics supplied)

This language is directly pertinent to our case. The plaintiff in attemping to cross the moving cut of cars acted on his own initiative and in violation of safety regulations. He adopted this method when it was particularly dangerous to do so because he had his hands encumbered. It was not the means of passage that was dangerous, it was rather the manner in which the plaintiff attempted to make use thereof.

It is also charged in the petition that perhaps the defendant should have constructed an overhead footpath and again it is charged that the defendant did not introduce evidence to show that such a bridge would not have been reasonable under the circumstances. Here again the petitioner overlooks the fact that the burden of proof rests on him.

It is always possible after an accident has occurred to suggest certain means which had they been adopted would have prevented the accident. This defendant had a choice of a number of means or methods, no one of which would be an inherently dangerous one, but in the use of any of which a person might possibly be injured. Here, however, in looking back upon the accident, what is it that most reasonably would have prevented the accident? The answer seems to be perfectly clear. Had the defendant done as other men at this time and place were doing, had he waited for the walkway to become clear, he would not have been injured.

We feel that we need give very little attention to the charge of negligence with respect to the condition of the brake step. In the first place there is not a scintilla of evidence of any defect therein. The whole contention rests upon the statement of plaintiff that something held his pants leg. He does not know what. Of necessity there is a brake mechanism on the end of the car. Pictures of the car are amid the exhibits. Suppose he did catch his foot or his trousers in that mechanism. Possibly that might have been due to some

defect therein. Possibly there was no defect. But even if speculation were permissible we do not need to speculate. The only evidence in the case that throws light on what it was that caught his foot or the pants leg of the defendant is the evidence of the witness, Duke, who says: "His heel or some part had caught in his overalls leg or his pants leg." (R. p. 109), and again: "It appeared that his heel was caught in his own trousers." (R. p. 110).

Finally it is charged that there was negligence with respect to the conditions under which the plaintiff was required to make his time report. The answer to this can be safely rested on the testimony of the plaintiff himself. He knew that there was no duty on him to register the time that he "knocked off". He knew that the conductor registered for the crew. He knew that the same crew which had come south from Richmond to Rocky Mount would some hours later take a train back north from Rocky Mount to Richmond. He knew that it made no difference when he made the report to the conductor so long as that report was made prior to the time the crew left for its return to the north. He knew that the crew reported for that return trip a half hour before leaving. He knew that about half the time he would happen to see his conductor around the Yard Office or on the street across the tracks therefrom immediately after he knocked off work and that he would then give his time to the conductor. He knew that in the other half of the time he would happen to see the conductor later on on the streets of the town, or he would not see him until he reported for the run back north, and that then he would make report. He knew that by custom and practice, not only with this conductor but with other conductors, this informal method of making the report was perfectly acceptable. This general custom and practice, and in particular the plaintiff's knowledge and

compliance with it, is in every respect equal to a formally promulgated rule that at his convenience he might make his report in this manner. And this custom was sensible. Had the conductor been instructed to wait in the Yard Office to receive this report, all he would have been doing would be idly waiting until the crew on the engine might have completed their duties (whether delayed or not delayed) and reach the Yard Office. For one member of that crew a convenient exit from the yard may have been by way of the Yard Office, for another member it may have been by another route. It was neither necessary nor reasonable that a specific time and place be designated, when by optional and convenient means, and without any inconvenience to anyone, the necessary report could be obtained.

4. Causal Connection.

Certainly this defendant does not question the soundness of the broad principles quoted from the Restatement of the Law of Torts on pages 38 and 39 of the petition. Certainly if it had been negligent, and its negligent conduct was a "substantial" factor in bringing about the harm, or if it had been negligent and the plaintiff's act was "a normal response to the stimulus of a situation created by" that negligence, the necessary causal connection would exist.

This defendant built a walkway across five tracks (10 rails) leading directly from the Yard Office to the street. The yardmaster gave as his reason for building this walkway a desire to keep people from having to walk through the mud. Since people will naturally and normally use the shortest route from a street to an office in a railroad yard, it might well have been negligence on the part of the defendant if someone had tripped over ties or rails and been injured. In other words the walkway was put there for the con-

venience and safety of people who had business at the Yard Office and who were approaching it from the west. Anyone using the walkway might with perfect correctness say that his action was "a normal response to the stimulus" of the fact that a walkway there existed. But it was not the use of the walkway that caused injury to the defendant. It was his failure properly to use it. It was his abandonment of the walkway that caused his injuries. Had he used the walkway for the purpose for which it was built, namely, to walk upon it, he would not have been injured. If we should engage in speculation and should speculate upon the question whether there was a defect in the gondola car, it would not be that defect that caused these injuries. That car, as the plaintiff well knew, was not there to be used by him as a substitute for a walkway.

Looked at from any point of view no one of the assumed acts of negligence can have any real causal connection with the injuries. If ever there was a clearly independent, intervening cause, it is here and is to be found in the impatient recklessness of plaintiff.

In closing this last point and in closing this brief, we are subject to the criticism of repetition, but the facts here speak so loudly that we repeat them. An experienced railway employee acting under no compulsion whatsoever, who labored under no personal need to hurry and immediately arrive at the point to which he was going, found his passageway through the yards of a large railway terminal blocked by an ordinary movement—a movement of a kind which at some point in these yards is taking place at almost every moment during the twenty-four hours. He may have had to wait two, five, possibly ten minutes. If he did not care to wait in order safely to reach the company's wash room, he could easily have turned around and gone to the Y.M.C.A.,

his own room, or some other wash room. Being perfectly aware of the situation he elects not to wait but to attempt to climb through or over this moving cut of cars. Although encumbered with two objects he mounts the side of a gondola car, eases himself around to the end of it where he has only narrow footing and tries to step across the opening between that and an adjoining flat car, on which of course there is nothing to which he can hold. He falls and he is injured.

Respectfully submitted,

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